



CONTAINS PERSONNEL INFORMATION
EXEMPT FROM DISCLOSURE
PURSUANT TO 10 CFR 2.390

OCT 14 2004

L-2004-246

Mr. Frank J. Congel
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Re: Florida Power & Light Company
Request for Withdrawal of Notice of Violation
EA-00-230, June 5, 2003
Duprey v. Florida Power & Light Company
Department of Labor (DOL) Administrative Review Board (ARB) Decision
(ARB Case No. 00-070 February 27, 2003)

Dear Mr. Congel:

Florida Power & Light Company (FPL) hereby requests that the Nuclear Regulatory Commission (NRC) withdraw the above-referenced Notice of Violation (NOV) in light of the Commission's decision in Tennessee Valley Authority (Watts Bar Nuclear Plant Unit 1, etc.) CLI-04-024, slip op. Aug. 18, 2004. In that decision, the Commission specifically directed the NRC Staff to allow employers, where the evidence of influence of protected activity on an employment action is weak, to avoid liability "by providing 'clear and convincing evidence' that they would have taken the same personnel action anyway, based on non-discriminatory grounds." Since the NRC based its NOV in EA-00-230, issued prior to the Commission's decision in CLI-04-024, on extremely weak and unreliable evidence of discriminatory intent, without considering the overwhelming evidence that FPL would have taken the same personnel action anyway based on non-discriminatory grounds, FPL respectfully submits that the NOV cannot be sustained and should be withdrawn.

Background

On January 28, 1999, FPL demoted Donald Duprey for excessive absenteeism. Duprey alleged in a 1999 DOL complaint that FPL demoted him in retaliation for having raised safety concerns. Beginning in 1995 through the date of his demotion, Duprey was repeatedly cautioned and counseled on the consequences of continued excessive absenteeism. The record clearly illustrates that FPL repeatedly and in good faith attempted through meetings, counseling, progressive discipline, and requirements for objective evidence of illness, to encourage Duprey to reduce his absenteeism. Despite FPL's efforts and progressive discipline, Duprey's record of absences did not improve over time. Therefore, FPL was justified in taking disciplinary action against Duprey for excessive absenteeism.

FPL's position was affirmed by the DOL's Occupational Safety and Health Administration (OSHA), a DOL Administrative Law Judge, the DOL's ARB, and the NRC's Office of Investigations (NRC-OI). NRC-OI concluded that FPL's demotion of Duprey was "consistent and metered with the purpose of resolving a protracted problem." OSHA found that Duprey "did not suffer any discrimination as alleged...." The DOL's ALJ determined that the record was "replete with substantial evidence demonstrating [Duprey's] repeated and open defiance of [FPL's] sick leave policy...[Duprey] plainly and knowingly decided to express his disagreement with company policy with behavior violative of the sick leave policy. And he did so with the knowing risk of sustaining the discipline ultimately imposed by the company." The DOL's ARB upheld the ALJ's finding that FPL had presented clear and convincing evidence that it would have demoted Duprey even in the absence of any protected activity.

The Unreliable Hearsay Testimony of Alleged Improper Motive

In the hearing before the ALJ, Scott Meier (Senior Nuclear Plant Operator) testified that Brian Stamp (Nuclear Plant Supervisor) told Meier that Donald Jernigan (then Turkey Point Plant Manager) had said to Stamp that Duprey was a "thorn in [Jernigan's] side and wanted him out of the Company. And the only way they could go about that was attendance." Despite denials of the alleged comments from Stamp and Jernigan under oath, the ALJ credited Meier's testimony, concluding simply that Meier had less reason to lie than a company supervisor and manager.

FPL argued in an April 2, 2003 letter to NRC that no weight should be given to the testimony on the alleged comment for the following reasons. First, the ARB stated that it was "skeptical of the reliability of Meier's hearsay testimony" and called the testimony "unreliable hearsay." Second, the ALJ noted that the comment was not clear evidence of discriminatory intent, and the evidence did not allow the ALJ to determine the clear meaning of the alleged statement. The ALJ recognized that the comment could have referred to either protected or non-protected activity, including Duprey's attendance record. Third, the ALJ's decision ignored Meier's bias against FPL. Meier, a fellow bargaining-unit member with Duprey, admitted at the hearing that he shared Duprey's beliefs that any discipline for absenteeism is "harassment." Meier clearly had an interest in supporting the union's position in this regard, and also in supporting his coworker Duprey, who was attempting to advance the union position by his discrimination claim. Finally, the Meier testimony, found to be "unreliable" by the DOL, would likely not be admissible in an NRC enforcement hearing, in which the NRC's Rules of Practice would govern and require such testimony to be "reliable." 10 CFR 2.743(c).

Notwithstanding FPL's arguments, NRC rejected FPL's position and imposed a Severity Level III violation for FPL's allegedly having demoted Mr. Duprey, "at least in part," for engaging in protected activity. At the time of the NOV, the Staff did not have the benefit of the Commission's views on its desired application of the "dual motive" standard in nuclear whistleblower discrimination cases.

At the time of the enforcement action in EA-00-230, the NRC Staff had expressed the position that in dual motive cases, a *per se* violation of 10 CFR 50.7(a) occurred because the NRC was not required to follow the requirements of Section 211 of the Energy Reorganization Act and evaluate whether the employer could demonstrate, by clear and convincing evidence, that it would have taken the same employment action for non-discriminatory reasons. This position has now been clarified by the Commission in CLI-04-24. The Commission stated that

The evidence, direct or indirect, must allow a reasonable person to infer that protected activities influenced the unfavorable personnel action to some degree. In cases where the evidence is weak, employers should be able to avoid liability by providing "clear and convincing evidence" that they would have taken the same personnel action anyway, based on non-discriminatory grounds.


CLI-04-024, slip op. at 21-22 [emphasis added; footnotes omitted].

In the Duprey case, the DOL determined that FPL proved by clear and convincing evidence that it had a legitimate business reason for the personnel action taken. This determination was not considered by the NRC Staff in EA-00-230. Based on the application of the Commission's guidance in CLI-04-24 to the facts of the enforcement case against FPL in EA-00-230, FPL's clear and convincing evidence that the same action would have been taken for non-discriminatory reasons should be considered in determining the outcome. Based on the facts in the DOL record in the Duprey case, the only logical conclusion is that no violation of 10 CFR 50.7(a) occurred.

As permitted by Section XIII of the NRC's Enforcement Policy, FPL respectfully submits that the NOV issued against FPL in EA-00-230 should be withdrawn in its entirety in light of the Commission's ruling in CLI-04-024.

Please contact Mitchell S. Ross, Managing Attorney, at 561-691-7126 should you have questions concerning this matter.

Sincerely yours,



J. A. Stall
Senior Vice President, Nuclear and
Chief Nuclear Officer

Cc: Dr. William D. Travers
Regional Administrator, Region II

Lawrence J. Chandler
Office of the General Counsel